FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 27 1947
CHARLES ELMORE CROPLEY
CLERK

No. 1051

In the Supreme Court of the United States

OCTOBER TERM, 1946

HEALTH-MOR, INC., PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Bowles v. *Baer*, 142 F. 2d 787	8
Bowles v. *Bay of New York Coal & Supply Corp.*, 152 F. 2d 330	6
Bowles v. *Shawano National Bank*, 151 F. 2d 749, certiorari denied, 327 U. S. 781	7, 9
Brown v. *United States*, 276 U. S. 134	9
Cameron v. *President & Fellows of Harvard College*, 157 F. 2d 993	10
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219	10
Credits Commutation Co. v. *United States*, 177 U. S. 311	10
Cresta Blanca Wine Co. v. *Eastern Wine Corp.*, 143 F. 2d 1012	10
Cudahy Packing Co. v. *National Labor Relations Board*, 117 F. 2d 692	9
Endicott-Johnson Corp., v. *Perkins*, 317 U. S. 501	10
Goodyear Tire & Rubber Co. v. *National Labor Relations Board*, 122 F. 2d 450	9
Hagen v. *Porter*, 156 F. 2d 362, certiorari denied, October 14, 1946, No. 331, O. T. 1946	7, 9
Johnson v. *United States*, 228 U. S. 457	7
McMann v. *Securities & Exchange Commission*, 87 F. 2d 377, certiorari denied, 301 U. S. 684	7
Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186	9, 10
Porter v. *Mueller*, 156 F. 2d 278	6
Smith v. *Porter*, 158 F. 2d 372	9
Tileston v. *Ullman*, 318 U. S. 44	7
Wolpe v. *Poretsky*, 144 F. 2d 505, certiorari denied, 323 U. S. 777	8
Zimmerman v. *Wilson*, 105 F. 2d 583	7

736224—47——1

Statutes and regulations:	Page
Emergency Price Control Act, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Secs. 901 et seq.):	
Sec. 202	9, 12
Order G–4 (10 F. R. 7829)	16
Revised Maximum Price Regulation 251 (9 F. R. 10200 as amended)	14
Miscellaneous:	
Federal Rules of Civil Procedure:	
Rule 24	4, 6
Rule 45	4, 6
Equity Rule 37	6
2 Moore, Federal Practice, p. 2325	6

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1051

HEALTH-MOR, INC., PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion; its findings of fact and conclusions of law appear at R. 71–72. The Circuit Court of Appeals merely entered a memorandum order dismissing the appeal (R. 116).

JURISDICTION

The order of the Circuit Court of Appeals dismissing the appeal was entered on November 27, 1946 (R. 116). The petition for a writ of cer-

tiorari was filed on February 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether petitioner, who had sold to a national bank certain negotiable instruments evidencing the sale of certain price-controlled commodities to various customers, was entitled to intervene and be heard on the issue of relevance and materiality, in a proceeding for compliance with subpoenas duces tecum issued by the Price Administrator and directed to the bank, pursuant to Section 202 of the Emergency Price Control Act of 1942, as amended, seeking production of such instruments and documents relating thereto.

2. Whether the order of the district court denying intervention to the petitioner is a final appealable order, where petitioner can assert his objections as to relevance and materiality in the separate enforcement suit against petitioner by the Administrator based on claimed overcharges in the sales to which the documents relate.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in the Appendix, pp. 12–19.

STATEMENT

Petitioner filed a motion to intervene (R. 45–47) and proposed answer (R. 47–54) in a sub-

poena compliance proceeding instituted by the Price Administrator against the American National Bank and Trust Company of Chicago and certain of its officers to compel production of documentary evidence, pursuant to Section 202 of the Act (R. 1–13). The subpoena enforcement proceeding was brought after the American National Bank and its officers had failed to comply with an inspection requirement and subsequent administrative subpoenas duly served upon them (R. 2–3, 5–12).

The records and documents sought to be produced were negotiable instruments acquired by the American National Bank from petitioner, and other documents, correspondence and records relating to these instruments. The negotiable instruments represent the consideration involved in certain time purchase contracts entered into between petitioner and those of its customers who purchased combination storm sashes and screens from petitioner on the time payment plan since June 20, 1945 (R. 5–12; 20).

The amended application for enforcement of the subpoenas set forth, in substance, that the Administrator had filed a civil enforcement action against petitioner in the same district court on account of violations of the Act and regulations and orders issued thereunder relating to the purchase and sale of combination storm sashes and screens; that petitioner in that action claimed he had not violated the Act or the regulations there-

under; that the records and documents requested by the inspection requirement and the subsequent subpoenas were deemed by the Administrator to be relevant and material to the procuring of information which he deemed necessary to assist him in enforcing the Act and regulations, especially Revised Maximum Price Regulation No. 251 (R. 1–13).

The American National Bank filed an answer to the Administrator's application for enforcement, admitting that it had possession and control of certain records which might be determined by the court to come within the terms of the inspection requirement and subpoenas, but alleging that it would not comply in view of its alleged duty to petitioner, its customer, who had requested non-compliance; that compliance would allegedly violate its constitutional rights; that the records sought are not records required to be kept by the Act or regulations threunder; that there was no showing of materiality or relevance of the information sought to any lawful inquiry under the Act; and that Rule 45 of the Federal Rules rather than Section 202 of the Act applied to the obtaining of information for use in a pending law-suit (R. 32–45).

Thereafter, petitioner filed its motion for leave to intervene, alleging grounds for intervention of right under Rule 24 (a) (2), and for permissive intervention under Rule 24 (b) (2), Federal

Rules of Civil Procedure (R. 45–47) and also filed a proposed answer containing objections substantially the same as those above which had been set forth by the American National Bank (R. 45–54).

In the district court, the Administrator contended that the records and documents were sought in aid of both the pending enforcement action against petitioner and a general investigation in the field of installed building materials (R. 24–25, 59–61).

Petitioner's principal contention in the district court was that there should be a hearing to determine whether the records and documents are relevant. The district court observed at the hearing, however, "I have inspected the subpoenas and it appears on the face of it all of those things asked for would be things they [the Administrator] would be entitled to inspect" (R. 65); that the document and records listed in the subpoenas were "probably relevant and probably material" (R. 68), though the court did not deem it necessary to make a specific finding to that effect (R. 65). The court nevertheless appointed a master in chancery to supervise the inspection and copying, and to pass on the materiality and relevancy of the documents (R. 71–72), and also observed in the record that petitioner could make its objections known to the master (R. 66–67).

In addition, the court concluded that petitioner was not entitled as of right to intervene, and upon

the showing made was not entitled to leave to intervene; and that the Administrator was entitled to the relief prayed for, upon summary application and without the necessity of resorting to the procedure provided by Rule 45, Federal Rules of Civil Procedure [1] (R. 71–72). Petitioner thereupon filed an appeal from the order denying intervention (R. 73). The Circuit Court of Appeals dismissed the appeal, without opinion (R. 116).

ARGUMENT

1. Petitioner claims it is entitled to intervention as of right under Federal Rule 24 (a) (2)[2] because the representation of its legal interests by the American National Bank is or may be inadequate, and it may be bound by a judgment in this proceeding. Petitioner, however, possesses no substantial legal interest in the documents. The bank was the owner thereof, in full possession and control (R. 20, 36). The fact that the documents

[1] Petitioner has apparently abandoned here its contention as to applicability of Rule 45. The district court ruling is in harmony with the decisions of the other courts which have ruled on the question. *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F. 2d 330 (C. C. A. 2); *Porter* v. *Mueller*, 156 F. 2d 278 (C. C. A. 3).

[2] While the applicability of Federal Rule 24 to this summary proceeding is doubtful (see *infra*, p. 9) the Rule embodies the prior practice under Equity Rule 37 (2 Moore, Federal Practice, p. 2325). Hence the requirements for intervention under Rule 24 are treated herein as though the Rule were applicable.

would reveal the names of petitioner's customers or reveal allegedly "private" or "confidential" credit transactions gave petitioner no such legal interest as would support a right of intervention—since claims of that nature even by a rightful intervenor or the respondent itself in a subpoena compliance proceeding, would not be sufficient to establish a legal interest immune from the investigative authority of the Administrator under Section 202 of the Act. *Bowles* v. *Shawano National Bank,* 151 F. 2d 749, 751 (C. C. A. 7) certiorari denied, 327 U. S. 781 (transactions between national bank and its depositors); *McMann* v. *Securities & Exchange Commission,* 87 F. 2d 377 (C. C. A. 2), certiorari denied, 301 U. S. 684 (transactions between stockbroker and customers); *Hagen* v. *Porter,* 156 F. 2d 362, 365 (C. C. A. 9), certiorari denied October 14, 1946, No. 331, O. T. 1946. Nor can petitioner properly claim a constitutional right under the Fourth Amendment against disclosure. Petitioner has no standing to make such a claim, since the bank, not petitioner, owns and possesses the documents. *McMann* v. *Securities & Exchange Commission, supra; Zimmerman* v. *Wilson,* 150 F. 2d 583 (C. C. A. 3); cf. *Johnson* v. *United States,* 228 U. S. 457, 458; *Tileston* v. *Ullman,* 318 U. S. 44.

Assuming, *arguendo,* that petitioner has a legal interest in this proceeding, petitioner can scarcely claim inadequate representation by the American

National Bank since the bank made substantially the same contentions in its answer as did petitioner in its proposed answer (see *supra*, pp. 4–5).[3] Nor can it show that it is or may be bound by a judgment directing the bank to allow examination by the Administrator. Such a judgment is a preliminary adjudication as to the right of the Government to conduct an investigation, which itself adjudicates no rights (*Bowles* v. *Baer*, 142 F. 2d 787 (C. C. A. 7)). Petitioner remains free, in the enforcement proceeding in which the information sought may possibly be used, to object on grounds of irrelevancy or any other grounds, to the admissibility of such evidence.

2. In any event, petitioner was not entitled to introduce evidence upon the issue of relevancy and materiality. Even if petitioner were entitled to intervene in the subpoena enforcement proceeding, he could not insist on more of a hearing on relevancy than was obtained in the district court. The court could rightfully conclude, as it did, that since petitioner had been sued for alleged

[3] Petitioner relies in this connection upon *Wolpe* v. *Poretsky*, 144 F. 2d 505 (App. D. C.), certiorari denied, 323 U. S. 777. In that case inadequacy of representation was shown by the party's refusal to appeal a doubtful decision; but here the bank has appealed from the district court's order, as petitioner points out (Brief, p. 24) though after the Circuit Court's dismissal of petitioner's appeal. The fact that the bank did not appeal first, obviously did not mean it refused or did not intend to appeal, as was true in the *Wolpe* case.

violations in the sale of combination storm sashes and screens (R. 1–2, 48), and since Section 202 of the Act authorized the Administrator to obtain information[4] which he deems necessary for purposes of administration or enforcement of the Act and regulations (both of which purposes were asserted (R. 4; 24, 59–60)), then it appeared on the face of the subpoenas that the requested documents showing sales of combination storm sashes and screens were relevant to a lawful inquiry, within the rule of *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186. Under such circumstances no taking of evidence at a hearing was required. *Brown* v. *United States,* 276 U. S. 134, 143; *Smith* v. *Porter,* 158 F. 2d 372, 374 (C. C. A. 9), petition for certiorari filed February 17, 1947, No. 1036, O. T. 1946; *Hagen* v. *Porter,* 156 F. 2d 362 (C. C. A. 9), certiorari denied October 14, 1946, No. 331, O. T. 1946.[5] Nor, if the Federal Rules would impose such a requirement, were the Rules applicable in this respect to a proceeding of this nature. *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F. 2d 450, 451 (C. C. A. 6); *Smith* v. *Porter, supra; Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. 2d 692

[4] This need not be information required to be kept by the regulations. (Section 202 (a), (c) of the Act, *infra*, pp. 12, 13; *Bowles* v. *Shawano National Bank, supra*).

[5] Thus, the district court did more than was required, in appointing a master to supervise the inspection and pass on questions of relevancy and materiality (R. 72).

(C. C. A. 10). Moreover, the apparent ground for petitioner's claim of irrelevancy is that its sales were not covered by, and did not violate, the regulation in question (R. 40–44; 52; Pet. Brief, 18). But a showing of coverage or of "probable cause" of violation is not a condition precedent to enforcement of an administrative subpoena such as this; the very purpose of the subpoena may legitimately be to discover whether the coverage and the violations exist. *Oklahoma Press Publishing Co.* v. *Walling, supra; Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501.

3. We urge, moreover, that the order denying intervention was not appealable. As has been indicated, petitioner's claim of intervention as of right was without substance, and petitioner can effectively assert any rights it may have in another action—the pending civil enforcement action brought by the Administrator against petitioner. Accordingly, and even though the claim be treated as one for permissive intervention (though petitioner does not make that claim in this Court), the denial of intervention was not appealable. *Cameron* v. *President & Fellows of Harvard College,* 157 F. 2d 993 (C. C. A. 1); *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.,* 143 F. 2d 1012 (C. C. A. 2); *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219.

CONCLUSION

The decision below is correct. There is no conflict, and no question of general importance is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement.

DAVID LONDON,
Director, Litigation Division.

SAMUEL MERMIN,
Solicitor, Litigation Division.

J. J. SCHALET,
Special Appellate Attorney.
Office of Price Administration,
Office of Temporary Controls.

MARCH 1947.

APPENDIX

STATUTE

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Section 901 et seq.):

> SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder.
>
> (b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under

this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, Title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) Any person subpenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.

REGULATIONS

Pertinent provisions of Revised Maximum Price Regulation No. 251, Construction Services And Sales Of Installed Building Materials, effective August 26, 1944 (9 F. R. 10200), as amended.

SECTION 1. *What this regulation covers*[1]—(a) *Transactions covered.*—This regulation applies to all construction services and sales of installed materials by any person in connection with a building, structure, or construction project.

This regulation applies in the forty-eight states of the United States, the District of

[1] As amended by Amdt. 1, effective Jan. 9, 1945 (10 F. R. 261), and Amdt. 2, effective June 18, 1945 (10 F. R. 7053).

Columbia, and, notwithstanding Maximum Price Regulation 194, in the Territory of Alaska.

* * * * *

(b) *Definitions.*—As used in this regulation, the term: * * *

(2)[2] "Sales of installed materials" means a transaction in which the seller furnishes materials and equipment together with the services required to incorporate such equipment or materials into a building, structure, or construction project at a fixed site. For the purposes of this regulation, any person who sells material or equipment, and in connection therewith, assumes responsibility for its incorporation into a building, structure, or construction project at a fixed site, by charging a single price for the commodity installed, by guaranteeing performance and use, or by other objective evidence, shall be considered a seller of installed material covered by this regulation.

SECTION 2. *Persons covered by this regulation.*—Any person who makes the kind of sale or supplies the kind of service and any person who makes the kind of purchase covered by this regulation is subject to it. The term "person" means an individual, corporation, partnership, association, or any other organized group of persons; its legal successors or representatives; the United States or any other government, or any of its political subdivisions; or any agency of any of the foregoing; and includes subcontractors as well as prime contractors.

* * * * *

SECTION 6. *Maximum prices for sales on a unit-price basis.* * * *

[2] As amended by Amdt. 2.

SECTION 7. *Maximum prices for sales on a contract job basis.* * * *
SECTION 8. *Price adjustments.* * * *
SECTION 9. *Regional pricing orders under this regulation.* * * *

Pertinent provisions of Order G–4 under RMPR 251, effective June 20, 1945 (10 F. R. 7829):

INSTALLED COMBINATION STORM SASH AND SCREENS IN CHICAGO REGION

Pursuant to the authority vested in the Regional Administrator of Region VI by section 9 of Revised Maximum Price Regulation No. 251, and by the Emergency Price Control Act of 1942, as amended; the Executive Orders No. 9250 and 9328, and for the reasons stated in an opinion, issued herewith, it is ordered:

(a) *What this order does.*—This order establishes maximum prices for the sale of all sizes and types of combination storm sash and screens "on an installed basis" by all sellers. Section (c) establishes prices for sellers other than manufacturers. Section (d) establishes prices for manufacturers.

(b) *Geographical applicability.*—This order shall apply to sales "on an installed basis" in the area known as Region VI, which includes the States of Illinois, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin and Lake County, Indiana. * * *

* * * * *

(f) *Definitions.*—(1) The phrase "on an installed basis" refers to the sale by a seller

of a "C S & S," together with the labor, services and material required to incorporate such "C S & S" into a building, structure, or construction project.

(2) "C S & S" means a combination storm sash and screen consisting of (1) a frame designed to be affixed to the window frame and which may or may not have built in features such as vents or louvers; (2) a storm window sash with one or two glazed sections, one or both of which can be demounted usually from inside the building; and (3) a half or full screen or combination of a top and bottom screen which can be inserted and substituted for the glass section or sections; and (4) necessary hardware and fixtures.

(3) "Seller" means the person who sells the "C S & S", and in connection therewith, assumes responsibility for its installation, by charging the purchaser a single price for the "C S & S" installed, by guaranteeing performance and use, or by other objective evidence.

(4) Except as otherwise provided herein or as the context may otherwise require, all terms used in this order shall bear the meaning given them in Revised Maximum Price Regulation No. 251, or the Emergency Price Control Act of 1942; or if not therein defined, they shall be given their ordinary and popular trade meaning.

(g) *Records and invoices.*—(1) Every seller of "C S & S" on an "installed basis" shall preserve records of all sales showing the information required by subparagraphs (i) to (vi) inclusive below and upon request by the purchaser shall furnish him with an invoice showing:

(i) Name and address of the buyer and seller.

(ii) The date on which the installation was completed.

(iii) The size of each "C S & S."

(iv) The price charged for each "C S & S," itemized in the following manner:

(a) The price charged by the seller, which consists of the total of the computations under section (c) (1) and (2) of this order.

(b) Installation charge.

(c) Painting charge, if any.

(v) The terms of sale.

(vi) A statement shown separately on the invoice of details and prices of any other work not covered by this order, but performed in connection with the sale of "C S & S."

(2) Every person making sales subject to this order shall notify the purchaser of the existence of this order, and, if requested, show the purchaser a copy of this order and Revised Maximum Price Regulation No. 251.

(h) *Relationship of this Order No. G–4 to Revised Maximum Price Regulation No. 251.*—(a) The provisions of this order supersede sections 6, 7 and 8 of Revised Maximum Price Regulation No. 251, except as otherwise provided herein, with respect to sales of "C S & S" on an "installed basis'. Except as otherwise provided herein, all transactions subject to this order shall remain subject to the provision of Revised Maximum Price Regulation No. 251, together with all amendments that have been or hereafter may be issued.

(b) On and after the effective date of this order, regardless of any contract or

other obligation, no person shall sell, offer to sell, or deliver "C S & S" on an "installed basis" and make charges for installing or painting, if any, at prices higher than the maximum prices established by this order.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947